178 (3)

No. 10-487

Supreme Court, U.S.
FILED
DEC 29 2010
OFFICE OF THE CLERK

In the
Supreme Court of the United States

MOHAMMED AL-ADAHI, DETAINEE,
CAMP DELTA, GUANTANAMO BAY NAVAL STATION,
GUANTANAMO BAY, CUBA;
MIRIAM ALI ABDULLAH AL-HAJ,
NEXT FRIEND OF MOHAMMED AL-ADAHI,
Petitioners,

v.

BARACK OBAMA;
ROBERT M. GATES; TOM COPEMAN,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ARGUMENT

In its Brief, the government comes close to conceding that the court of appeals erred in establishing a new standard of appellate review for civil cases known as "conditional probability." Its defense is to reargue the merits and frame *Al-Adahi* as a one-off, unimportant appellate error unworthy of Supreme Court supervision. Petitioner respectfully submits it is neither. *Al-Adahi* is part of a demonstrable pattern in which the D.C. Circuit, having been reversed in *Boumediene v. Bush*, 553 U.S. 723 (2008), has thwarted that decision at every turn, creating a logjam for the many habeas cases in the pipeline and, in this case, abandoning the rule of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

A. The government hardly defends the circuit's decision reversing the district court.

Al-Adahi testified live by video link from Guantánamo. The government glosses over that fact, and never confronts the circuit's fallacy that live testimony can be weighed by a rule of statistics. Only the district court heard Al-Adahi testify that he was never a member of Al Qaeda or a soldier in Afghanistan and weighed that testimony against the other, exclusively hearsay evidence.[1]

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[1] The government claims it "produced 'damaging and powerful' classified evidence that petitioner was part of Al Qaeda". Br. in Opp'n at 11. But the district court weighed the credibility of that evidence too, rejecting it as ambiguous and therefore not proving the government's point. Pet. App. 39a.

Ancient and--until now--unbroken jurisprudence teaches that only the fact finder could weigh the credibility of that testimony. *See., e.g., Kansas v. Ventris,* 129 S. Ct. 1841, 1847 n.* (2009) ("Our legal system, however, is built on the premise that it is the province of the jury to weigh the credibility . . . ."); *Maryland v. Craig,* 497 U.S. 836, 846 (1990) (observing the demeanor of a witness aids in determining credibility); *Stewart v. Sonneborn*, 98 U.S. 187, 191 (1878) (defendant's belief of the facts is always a question of credibility for the jury).[2]

Under *Anderson,* the district court should not have been reversed. Having seen Al-Adahi testify live--on both direct and the government's cross examination--and with two plausible inferences to be drawn from the evidence, the district court's factual determination that Al-Adahi was not part of Al Qaeda was not subject to second guessing.

> If the District Court's account of the evidence is *plausible* in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting

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[2] Whether facts are found by a judge or jury, seeing and hearing live testimony while considering other evidence gives the fact finder a unique role--one that can never be replaced by an appellate court reading a transcript. An essay by G. K. Chesterton paraphrased by the court in *Commonwealth v. Marple*, 26 Mass. App. Ct. 150, 161 (1988), deftly describes the gravity of the fact-finder's role: "as the jury received the case and entered the jury room, 'it seemed as if the Holy Ghost descended upon us.'" The long settled standard of review in civil cases recognizes the special role of the trial court in considering all the facts as presented.

> as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.*

470 U.S. at 573-74 (emphasis added).

To avoid *Anderson,* the Court of Appeals created a new[3] "conditional probability" rule permitting it to substitute its judgment for that of the district court. The fallacious basis for the rule and its use to transform a disagreement about the facts into legal error[4] are discussed in Al-Adahi's petition.[5] The circuit created a standard, contrary to *Anderson,* permitting it to substitute its own fact-finding for the district court's, even in cases involving live testimony.[6]

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[3] As discussed in the Petition, *United States v. Prandy-Binett*, 995 F.2d 1069 (D.C. Cir. 1993), was confined to probable cause determinations. *Al-Adahi* is its first use in reviewing the decision of a district court finding facts at trial.

[4] "[W]e need to mention an error that affects much of the district court's evaluation of the evidence" Pet. App. 7a.

[5] "Conditional probability" is rightly described by the dissent as "a bizarre theory" and "gobbledy-gook"--strong words--in the probable cause decision that gave rise to it. *Prandy Binett*, 995 F.2d at 1074, 1077 (dissenting opinion).

[6] The circuit's decision here is reminiscent of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), where the Fifth Circuit examined the same evidence as the district court, and like the circuit court here, found the district court had committed error. There the issue was discriminatory intent, which the Fifth Circuit found to be an ultimate fact permitting it to make an independent determination. 456 U.S. at 285. This Court reversed holding that ultimate facts are nonetheless facts to be found by the district

That new standard is now applicable to the review of all civil non-jury trials in the D.C. Circuit.

The government's embrace of conditional probability is a chaste one. It never cites *Prandy-Binett,* instead recharacterizing the court of appeals' wholesale change in the scope of review as "a principle of reasoning that is consistent with this Court's decisions." Br. in Opp'n at 10. For that "consistency," the government cites nothing, because, following *Anderson,* the circuit courts have not run roughshod over the district courts' fact-finding. In short, the government's defense of "conditional probability" is dispirited at best.

The government never explains how the court of appeals' "new math" can be squared with a system of justice in which testimony matters and trial courts judge its credibility--making all the qualitative judgments that affect that assessment. What is the "conditional probability" that Al-Adahi testified truthfully? Which mathematical scales allow an appellate court on a cold record to reweigh live testimony against circumstantial hearsay (some of which was never argued to the district court)? In rearguing the merits of the case resolved below, the government glosses over the system-rocking import of the court of appeals decision: the wholesale rewriting of the scope of appellate review in civil cases in which the district court is the fact-finder. The government

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court. Whether a man intended to and became a member of Al Qaeda is such a fact.

reargues the facts of this case,[7] but it is precisely in close factual cases that the rule limiting the scope of review is most important. In such cases, the danger is greatest that the role of the trial court as fact-finder can be swept away.

Related to the new appellate standard of review is the court of appeals' creation in *Al-Adahi* of an irrebutable presumption. The court of appeals restated an earlier dictum from *Al-Bihani v. Obama,* 590 F.3d 866, 873 n.2 (D.C. Cir 2010), to make attendance at al Faroq or al Nebras (a guest house) "'overwhelmingly, if not definitively, [justification of] detention." Pet. App. 20a. If the government has the burden to prove by a mere preponderance of the evidence that a man was part of the fighting forces of the Taliban or Al Qaeda and offers that "overwhelming evidence", a petitioner has essentially been deprived of a meaningful defense. How exactly, might it be overcome? The government glosses over the newly created presumption that it now uses routinely against other detainees, by saying "well, there was other evidence here." But other evidence will hardly matter when the district courts see how the circuit in this case used its presumption to sweep aside any other weakness in the government's theory.

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[7] Indeed, the government spends the bulk of its Brief explaining why a reasonable fact-finder might have viewed the facts differently than the trial court did. But that, of course, is an implicit concession that the ruling of the circuit court was legally wrong under *Anderson*.

B. *Al-Adahi* is not an isolated case.

Following the Court's direction in *Boumediene v. Bush*, 553 U.S. 723, 794 (2008), the district courts in the D.C. Circuit began hearing Guantánamo habeas cases. In the cases tried, the district courts granted the petition in thirty-eight cases and denied the petition in eighteen. The circuit's decision in *Al-Adahi* controls those and many remaining cases.

At the D.C. Circuit, Guantánamo petitioners have hit a road block. Consequently, six other petitions for certiorari in Guantánamo cases are pending this term: *Al Odah v. Obama*, No. 10-439 (U.S. filed Sept. 28, 2010; *Ameiene v. Obama*, No. 10-447 (U.S. filed June 29, 2010); *Awad v. Obama*, No. 10-736 (U.S. filed Nov. 30, 2010); *Mohammed v. Obama*, No. 10-746 (U.S. filed Nov. 5, 2010); *Khadr v. Obama*, No. 10-751 (U.S. filed Dec. 2, 2010); and *Kiyemba v. Obama*, No. 10-775 (U.S. filed Dec. 8, 2010) (Petition for Certiorari).[8] *Al-Adahi* is most assuredly not an isolated case.

The D.C. Circuit appears intent on reversing the effect of this Court's decision in *Boumediene*. The new mathematical conditional probability standard of review and the al Faroq presumption are part of a Guantánamo pattern. The author of *Al-Adahi* in the Court of Appeals also wrote *Rasul v. Bush*, 321 U.S. F.3d 1134 (D.C. Cir. 2003), *rev'd*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723

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[8] Petitions in *Mohammed, Khadr and Kiyemba* challenge other aspects of the circuit's treatment of Guantánamo cases.

(2008). As a senior judge, the author of *Al-Adahi* is added to randomly assigned two-judge panels and often hears Guantánamo cases. He has all but announced a public agenda. In his lecture entitled "The Guantanamo Mess", he stated publicly that this Court erred in *Boumediene*. Judge A. Raymond Randolph, *The Guantanamo Mess*, The Center for Legal and Judicial Studies--Joseph Story Distinguished Lecture (Oct. 10, 2010), http://www.heritage.org/Events/2010/10/Guantanamo-Mess. No prevailing petitioner has survived a trip to that court,[9] and multiple petitions for certiorari now pending--and more are coming--in Guantánamo cases seeking this Court's attention.

The court of appeals radically departed from this Court's dispositive precedent in *Anderson*, creating a new standard of review applicable to all civil non-jury cases. It is one thing to argue about detention standards and this Court's decision in *Boumediene*, but to announce a wholesale departure from a settled rule of appellate review just to ensure the continued detention of a single Guantánamo detainee is difficult to explain, except as flowing from the circuit court's passionate animosity to the Guantánamo cases and, perhaps, this Court's repeated reversals of its decisions. Whatever the explanation, it is no warrant to rewrite appellate review in all non-jury civil cases. The price of the circuit court's determined assault on *Boumediene* is, in this case, a reconfiguration of the roles of trial and appellate courts.

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[9] One case was remanded to the district court following denial of the writ. *Bensayah v. Obama*, 08-5537 (D.C. Cir. June 28, 2010).

C. Our system of justice does not work if lower courts ignore the decisions of this Court.

When the Court decided *Anderson* in 1985, its clarification of the deference due to district courts sitting as fact-finders was based on a desire to preserve the effectiveness of the federal judiciary. The judicial system works best, this Court held, when non-jury civil trials in the district courts receive great deference on appeal.

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources. . . .[T]he trial on the merits should be the main event . . . rather than a tryout on the road.

Anderson, 470 U.S. at 574-75.

This consideration applies to cases of all types, regardless of their subject matter, legal significance, or controversial nature. Indeed *Anderson* was an otherwise utterly unremarkable case involving a dispute over events at a meeting of a minor municipal committee in a small town. There, as here, the court of appeals was convinced that it would have decided the facts differently. In the interests of system-wide judicial efficiency, this Court stepped in to reverse, as it should here.

But, of course, this case involves much more important and controversial legal issues than *Anderson* did--whether district courts may follow *Boumediene*. The circuit's reversal here raises a second, entirely independent reason calling for this Court's intervention: the imperative of seeing its rulings enforced by the lower courts, regardless of disagreement with the decisions, an imperative the importance of which is at its height in cases involving controversial issues of constitutional law.

Unless the lower courts follow this Court's decisions, even if they disagree with its opinions and the constitutional provisions they enforce, the Court is reduced to writing law review articles. That is the fundamental reason why this Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), went to such lengths to reaffirm that lower courts are bound to adhere faithfully to the Court's rulings.

Unwilling to abide the commands of *Boumediene*, the court of appeals has thwarted the intent and rule of that decision at every turn.[10] *Al-Adahi* is evidence that the court will create new and dangerous theories to overturn the findings of trial judges. Presuming that this Court meant what it said in *Boumediene*, it should grant certiorari and reverse.

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[10] *See, e.g., Kiyemba v. Obama*, No. 10-775 (U.S. filed Dec. 8, 2010) (Petition for Certiorari). In *Kiyemba* the same circuit court judge ruled that there is no judicial power to direct the release of any Guantánamo prisoner, despite--and without mentioning--this Court's holding in *Boumediene* that the trial court must have the power in a Guantánamo case to issue "if necessary, an order directing the prisoner's release." *Boumediene*, 553 U.S. at 723.

CONCLUSION

Petitioner Al-Adahi, who will observe his ninth anniversary in Guantánamo about the time the Court considers this petition for certiorari, respectfully urges that this Court review his case and reverse the decision of the court of appeals.

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